Supreme Court, U.S.
FILED

06-287 AUG 25 2006

OFFICE OF THE CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT L. AYERS, Jr., Acting Warden, San Quentin State Prison, California, *Petitioner*,

v.

WILLIAM CLARK, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
MARY JO GRAVES
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney Genera
DONALD E. DE NICOLA
Deputy State Solicitor Generall
KEITH H. BORJON
Supervising Deputy Attorney General
SCOTT A. TARYLE
Deputy Attorney General
State Bar No. 156158
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-2363
Fax: (213) 897-6496
Email: DocketingLAAWT@doj.ca.gov
Counsel for Petitioner

QUESTION PRESENTED
FORMER CAPITAL CASE

In *Rogers v. Tennessee*, 532 U.S. 451, 461-62 (2001), this Court held that a proper due-process analysis of a state court's new interpretation of the scope of a criminal statute must accommodate the state courts' legitimate need to clarify, reevaluate, and refine judicial doctrines to address new facts or to conform to common sense. Here, the Ninth Circuit Court of Appeals held that the California Supreme Court's interpretation of a judicially-created exception to the state's death-penalty provision for certain felony-murders—an exception applicable where the felony is merely "incidental" to the killing—was "unforeseeable" and violated respondent's right to due process in that it did not give respondent fair notice that setting fire to the victim's house in order to drive him outside to shoot him was a capital offense.

The question presented is:

Did the Ninth Circuit fail to afford the California Supreme Court the latitude required by *Rogers*?

TABLE OF CONTENTS

	Page
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT STATUTORY PROVISION	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	4
THE NINTH CIRCUIT'S OPINION DISREGARDS THIS COURT'S DIRECTIVE IN *ROGERS* V. *TENNESSEE* TO ACCOMMODATE THE STATE COURT'S PROPER JUDICIAL FUNCTION OF CLARIFYING AND REFINING LEGAL DOCTRINES AS NEW FACTS AND CIRCUMSTANCES PRESENT THEMSELVES	4
A. The Constitution Limits A State Court's Interpretation Of The Scope Of A State Criminal Statute Only In Extreme Circumstances	5
B. Respondent's Liability For The Death Penalty Was Foreseeable Notwithstanding California's "*Green* Rule"	6
C. The State Court's Ruling That Respondent Was Liable For The Arson-Murder "Special	

TABLE OF CONTENTS (continued)

Page

Circumstance" Was Foreseeable And Defensible Under *Rogers* v. *Tennessee* 10

D. The Ninth Circuit Failed To Give Proper Deference, Under *Rogers*, To The State Supreme Court's Function In Developing And Clarifying The Law, Especially In Light Of The Novelty Of The *Green* Rule Itself 11

CONCLUSION 14

TABLE OF AUTHORITIES

	Page
Cases	
Ario v. *Superior Court*, 124 Cal. App. 3d 285 (1981)	12
Bouie v. *City of Columbia*, 378 U.S. 347 (1964)	3, 5
Bradford v. *Richey*, 126 S. Ct. 602, 163 L. Ed. 2d 407 (2005)	5
Carlos v. Superior Court, 35 Cal. 3d 131 (1983)	8
Clark v. Brown, 450 F.3d 898 (9th Cir. 2006)	1, 3, 4, 11, 12
People v. Clark, 50 Cal. 3d 583, 268 Cal. Rptr. 399 (1990)	1, 3, 11
People v. *Green*, 27 Cal. 3d 1 (1980)	3
People v. *Hernandez*, 47 Cal. 3d 315, 253 Cal. Rptr. 199 (1988)	9
People v. *Kimble*, 44 Cal. 3d 480, 244 Cal. Rptr. 148 (1988)	9

TABLE OF AUTHORITIES (continued)

	Page
People v. Murtishaw, 29 Cal. 3d 733, 175 Cal. Rptr. 738 (1981)	8
People v. *Robertson*, 33 Cal. 3d 21, 188 Cal. Rptr. 77 (1982)	9
People v. Sanders, 51 Cal. 3d 471, 273 Cal. Rptr. 537 (1990)	10
People v. *Sheppard*, 192 Cal. Rptr. 427 (1983)	10
People v. *Smith*, 186 Cal. Rptr. 650 (1982)	8
People v. Smith, 718 P.2d 66, 226 Cal. Rptr. 79 (1986)	8
People v. *Thompson*, 27 Cal. 3d 303, 165 Cal. Rptr. 289 (1980)	7, 8
People v. *Williams*, 44 Cal. 3d 883, 245 Cal. Rptr. 336 (1988)	9
Rogers v. Tennessee, 532 U.S. 451 (2001)	i, 4-6, 11-13

TABLE OF AUTHORITIES (continued)

	Page
United States v. *Lanier*, 520 U.S. 259 (1997)	5
Webster v. *Woodford*, 369 F.3d 1062 (9th Cir. 2004)	8
Statutes	
28 U.S.C. § 1254(1)	2
Cal. Penal Code § 189	11
Cal. Penal Code § 190.2(a)(17)	2, 3, 6, 7, 11
Cal. Penal Code § 190.2(c)(3)	7

IN THE SUPREME COURT OF THE UNITED STATES

No.

ROBERT L. AYERS, Jr., Acting Warden, San Quentin State Prison, California, *Petitioner*,

v.

WILLIAM CLARK, *Respondent*.

PETITION FOR WRIT OF CERTIORARI

Robert Ayers, Acting Warden of San Quentin State Prison in California, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The amended opinion of the Court of Appeals, filed on May 30, 2006, appears as Appendix A and is reported as *Clark v. Brown*, 450 F.3d 898 (9th Cir. 2006). The original opinion filed on February 17, 2006, appears as Appendix B and was reported at 442 F.3d 708. The California Supreme Court's opinion on respondent Clark's direct appeal appears as Appendix C and is reported as *People v. Clark*, 50 Cal. 3d 583, 268 Cal. Rptr. 399 (1990).

JURISDICTION

The Court of Appeals issued its amended opinion and denied the State's petition for rehearing en banc on May 30, 2006. Appendix A. This petition for writ of certiorari follows within 90 days. The State invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

California Penal Code section 190.2(a)(17) provides for a "special circumstance" in murder cases, qualifying the defendant for sentences of life in prison without possibility of parole or death, where the jury finds:

> The murder was committed while the defendant was engaged in or was an accomplice in the commission of, or the immediate flight after committing or attempting to commit the following felonies: . . .
>
> (viii) Arson in violation of Section 447.

STATEMENT OF THE CASE

Respondent William Clark was obsessed with his therapist, Ava Gawronski. After he attempted to rape her during a therapy session, she discontinued the therapy. Clark then devised a scheme to cause Ava to feel "loss" by murdering her husband, David. Clark set fire to David and Ava's house, killing David, severely burning and disfiguring Ava, and endangering their infant daughter. According to Clark's statements to police and his trial testimony, his intent in setting the fire was not to burn David or the other family members to death, but instead to drive the entire family out of the house so that he then could shoot and kill David in front of his wife and child.

A jury convicted Clark of the first-degree murder of David; the second-degree attempted murders of Ava and her daughter;

and arson. The jury also found a felony-murder "special circumstance" (Cal. Penal Code § 190.2(a)(17)) based on the arson. Clark was sentenced to death.

On direct appeal to the California Supreme Court, Clark claimed that the trial court erred by refusing to instruct the jury on the so-called "*Green* rule," a recently-created judicial exception to the felony-murder special circumstance where the felony underlying the murder is "merely incidental" and lacks an "independent purpose." See *People* v. *Green*, 27 Cal. 3d 1, 61 (1980). In affirming the judgment, the California Supreme Court held that the omission of a *Green* instruction was error under state law. But the court found the error harmless in light of overwhelming evidence that respondent's purpose for setting the fire was to drive each of the family members outside, rather than to burn David to death. That purpose, the court explained, "would not invoke the *Green* rule since defendant had independent, albeit concurrent, goals." Appendix C, p. 71; *People* v. *Clark*, 50 Cal. 3d at 608-09, 268 Cal. Rptr. 399.

Clark challenged that ruling in federal court on habeas corpus. The district court denied the habeas petition. In a published opinion, however, the Ninth Circuit reversed and remanded to the district court with instructions to grant partial habeas corpus relief, invalidating the special circumstance and hence the death sentence, but allowing Clark's convictions for first-degree murder and all other counts to stand. Appendix A; *Clark v. Brown*, 450 F.3d 898 (9th Cir. 2006).

The Ninth Circuit held that the trial court's failure to give a *Green* instruction violated Clark's due-process right to instructions on his defense theory that the arson was merely incidental to the murder. Relying on *Bouie* v. *City of Columbia*, 378 U.S. 347 (1964), the Ninth Circuit held that the California Supreme Court's harmless-error ruling violated due process by retroactively changing the state court's own interpretation of the *Green* rule. Under its own interpretation of California law at the time of the arson-murder, and contrary to the California Supreme Court's opinion, the Ninth Circuit held that

respondent's intent to burn the house in order to drive the occupants outside was not an "independent purpose" under *Green*. As an explanation, the Ninth Circuit stated that the murder was not intended to advance or facilitate the arson and that Clark's purpose for driving the family outside was to kill David. Appendix A, pp. 17-18; *Clark* v. *Brown*, 450 F.3d at 910-11.

REASONS FOR GRANTING THE PETITION

THE NINTH CIRCUIT'S OPINION DISREGARDS THIS COURT'S DIRECTIVE IN *ROGERS* V. *TENNESSEE* TO ACCOMMODATE THE STATE COURT'S PROPER JUDICIAL FUNCTION OF CLARIFYING AND REFINING LEGAL DOCTRINES AS NEW FACTS AND CIRCUMSTANCES PRESENT THEMSELVES

Certiorari should be granted because the Ninth Circuit failed to follow this Court's decision in *Rogers* v. *Tennessee*, 532 U.S. 451 (2001). Rather than afford the state court *greater* latitude in light of the developing nature of the state-law "*Green* rule,"the Ninth Circuit disregarded this Court's directive in *Rogers* to accommodate state courts' legitimate need to develop and refine their own judicial doctrines. Picking and choosing among state court authorities, the Ninth Circuit instead adopted its own competing and static interpretation of California law at the time of the crime, allowing no room for "fashioning and refining the law . . . in light of reason and experience." *Rogers*, 532 U.S. at 462.

A. The Constitution Limits A State Court's Interpretation Of The Scope Of A State Criminal Statute Only In Extreme Circumstances

This Court has recognized that a state court's construction of a criminal statute, applied retroactively to subject a person to criminal liability for past conduct, sometimes might violate "due process of law in the sense of fair warning that his contemplated conduct constitutes a crime." *Bouie* v. *City of Columbia,* 378 U.S. 347, 354-55 (1964). A due process violation occurs, however, only when the "state court's construction of a criminal statute was *so* unforeseeable as to deprive the defendant of the fair warning to which the Constitution entitles him." *Id.* at 354, italics added.

This Court has historically demanded a very high degree of "unforeseeability" as a prerequisite for finding this kind of due-process error: The judicial interpretation must be "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Bouie*, 378 U.S. at 353; *accord Rogers*, 532 U.S. at 457. Moreover, the due process right to notice requires only "reasonable warning" that one's conduct is proscribed; it does not require "fundamentally similar cases." *Bradford* v. *Richey*, 126 S. Ct. 602, 604, 163 L. Ed. 2d 407 (2005) (citing *United States* v. *Lanier*, 520 U.S. 259, 269-70, (1997)). And, as this Court warned in *Rogers* v. *Tennessee*, overly stringent applications of the due-process test would have an unwarranted chilling effect on the courts' traditional and legitimate function of developing and refining judicial doctrines on an ongoing basis.

> In the context of common law doctrines . . ., there often arises a need to clarify or even to reevaluate prior opinions as *new circumstances and fact patterns present themselves.*

532 U.S. at 461, italics added (declining to import ex post facto principles into the *Bouie* doctrine).

The "unexpected and indefensible" interpretation standard therefore strikes a balance between the due process interest in preventing "vindictive or arbitrary judicial lawmaking" and the

courts' need to "reevaluat[e] and refin[e]: judicial doctrines "as may be necessary to bring the common law into conformity with logic and common sense." *Rogers*, 532 U.S. at 461-62.

> [T]he fact of the matter is that common law courts then, as now, were deciding cases, and in doing so were fashioning and refining the law as it then existed in light of reason and experience. Due process clearly did not prohibit this process of judicial evolution at the time of the framing, and it does not do so today.

Id. at 462.

Under the due-process standard as informed by *Rogers*, the California Supreme Court's decision to uphold the "special circumstances" verdict in respondent's case notwithstanding the state-law "*Green* rule" was proper and should not have been second-guessed by the Ninth Circuit.

B. Respondent's Liability For The Death Penalty Was Foreseeable Notwithstanding California's "*Green* Rule"

The history of the "*Green* rule" or "*Green* exception" supports the California Supreme Court's view that the rule provided no protection from the death penalty to a murderer who killed and intended to kill in an arson planned as a way of driving the victim outdoors so that he could be shot in the presence of his wife and child. First, as the Ninth Circuit acknowledged, Appendix A, p. 20; *Clark* v. *Brown*, 450 F.3d at 912, the straightforward language of California's 1978 death-penalty statute, would plainly apply to Clark's murder of David by setting fire to his house. Thus, California Penal Code section 190.2(a)(17) provides for a death-penalty-qualifying "special circumstance" for murders committed "while the defendant was engaged in" certain enumerated felonies including arson.

In 1980, two years before respondent's crime, the California Supreme Court decided *Green*, a capital case with very peculiar facts distinguishable from those in respondent's case. Green murdered his wife and, as an afterthought, removed and

destroyed her clothing and jewelry solely to prevent identification. 27 Cal.3d at 51. By taking those items, Green technically committed a robbery that served as the basis for the jury's finding of a felony-murder "special circumstance" qualifying the defendant for the death penalty under former California Penal Code section 190.2(c)(3) (now Cal. Penal Code § 190.2(a)(17)). The California Supreme Court reversed the special-circumstance verdict, holding that the murder was not committed during a robbery within the meaning of the statute. *id.* at 61-62. The *Green* court explained that the purpose of section 190.2, to provide a rational and non-arbitrary basis for distinguishing capital from non-capital murders, would not be achieved if the statute were to apply to technical robberies "when the defendant's intent is not to steal but to kill and the robbery is *merely incidental* to the murder . . . because its *sole object* is to facilitate or conceal the primary crime." *Id.* at 61, italics added.

A second *Green*-type case also involved unusual facts different from those in this case. In *People* v. *Thompson*, 27 Cal. 3d 303, 165 Cal. Rptr. 289 (1980), decided two months after *Green,* a hired assassin took the murder victim's car keys to make the hired killing look like it resulted from a commonplace burglary and robbery. 27 Cal.3d at 310-11. Citing *Green*, the state supreme court struck felony-murder "special circumstance" findings based on robbery and burglary, finding that the theft of the car keys was "merely incidental to the murder." *Id.* at 324.

Both *Green* and *Thompson* presented extreme cases with unusual facts. Only by a technicality did the crimes in either case constitute robbery, and thus the underlying robberies were insufficient to support felony-murder death-penalty liability. Neither case definitively tested the boundaries of what is "merely incidental" to a murder. Most important, in *Green* and *Thompson* there was no evidence that the defendant harbored multiple, *concurrent* objectives in committing felony-murder. Neither of the defendants had any genuine intent to commit

robbery at all; their "sole objective" was murder. *Green*, 27 Cal. 3d at 61; *Thompson*, 27 Cal. 3d at 322.

The issue of concurrent objectives was broached in the third California Supreme Court case addressing the "*Green* rule," *People v. Murtishaw*, 29 Cal. 3d 733, 175 Cal. Rptr. 738 (1981), a capital case decided *before* Clark committed his crimes. *Murtishaw* held that there was sufficient evidence that a murder was "committed in the perpetration of, or attempt to perpetrate" an enumerated felony for purposes of California Penal Code section 189, defining first-degree murder, where the perpetrator harbored "concurrent objectives" in committing the underlying felony and the murder. 29 Cal. 3d at 752 n.13. *Murtishaw* expressly distinguished *Green*, noting there was evidence in *Murtishaw* that "the theft here was not ancillary to the murder, but . . . a *concurrent objective*," and that the defendant had both "an independent intent to kill" and an intent to steal. *Id.* Although the precise issue in *Murtishaw* was the scope of first degree felony-murder, not the felony-murder "special circumstance" addressed in *Green*, it was certainly foreseeable that California courts would import the "concurrent objectives" ruling of *Murtishaw* into the interpretation of the special circumstance statute. See *Webster* v. *Woodford*, 369 F.3d 1062, 1074-75 (9th Cir. 2004) (it was foreseeable, for *Bouie* purposes, that state court's interpretation of lying-in-wait for purposes of first degree murder statute would be imported into lying-in-wait special circumstance statute). Indeed, the very fact that *Murtishaw* found it necessary to discuss and distinguish *Green* sent a strong signal from the state supreme court that the same "concurrent objective" test would apply in *both* contexts. See, *e.g.*, *People* v. *Smith*, 186 Cal. Rptr. 650, 660-61 (1982),[1/]

---

1. The California Supreme Court granted hearing and remanded *Smith* to the California Court of Appeal for reconsideration in light of *Carlos v. Superior Court*, 35 Cal. 3d 131 (1983), which involved a different issue regarding intent to kill in felony-murder special circumstance cases. *People v. Smith*, 718 P.2d 66, 226 Cal. Rptr. 79 (1986), *on remand*, 187 Cal. App. 3d 666, 231 Cal. Rptr. 897 (1986). Petitioner cites the original,

(citing *Murtishaw* as authority that "concurrent motivations"—killing victim both for personal revenge and to facilitate robbery—satisfied the *Green* rule with respect to the felony-murder special circumstance); *People* v. *Williams*, 44 Cal. 3d 883, 927-29, 245 Cal. Rptr. 336 (1988) (citing *Murtishaw* as authority regarding *Green* rule in context of felony-murder special circumstance); see also *People* v. *Hernandez*, 47 Cal. 3d 315, 343-44, 348, 253 Cal. Rptr. 199 (1988) (discussing *Green* in context of first degree felony-murder statute, rather than felony-murder special circumstance).

In the years following Clark's crime in 1982, the *Green* rule continued to evolve as new fact patterns presented themselves to the courts. California courts have repeatedly opined or implied that *Green* was an anomaly that had created a rare exception to—not an element of—the felony-murder "special circumstance" rule. See *People* v. *Robertson*, 33 Cal. 3d 21, 52, 188 Cal. Rptr. 77 (1982) ("'incidental robbery theory' of *Green*" is not "a general principle of law 'closely and openly connected with the facts before the court'" to support a *sua sponte* duty to instruct); *People* v. *Kimble*, 44 Cal. 3d 480, 502-03, 244 Cal. Rptr. 148 (1988) (*Green* theory not an "element" of a special circumstance).

Moreover, multiple California decisions found the *Green* exception to be inapplicable where the defendant harbored "concurrent objectives" in committing felony-murder. See *Smith*, 186 Cal. Rptr. at 660-61 (no *Green* error where defendant killed to eliminate witness to robbery "or at least . . . acted with concurrent motivations"); *Kimble*, 44 Cal. 3d 480, 502-03, 244 Cal. Rptr. 148 (1988) (evidence clearly showed "concurrent intent"); *Williams*, 44 Cal. 3d 883, 927-29 (kidnaping-murder special circumstance satisfied *Green* where

---

superseded *Smith* opinion not as authority for the legal propositions therein, but instead to demonstrate by example that California jurists believed the *Murtishaw* "concurrent goals" interpretation of the *Green* rule applied to special circumstance cases.

defendant kidnaped victim both to rape and murder her, as kidnaping had "purpose other than and in addition to killing her"); see also *People v. Sanders*, 51 Cal. 3d 471, 519-20, 273 Cal. Rptr. 537 (1990) (refusing to extend *Green* to witness-killing special circumstance; special circumstance applicable even if defendant also harbored a second purpose for killing the witness-victim).[2/]

C. The State Court's Ruling That Respondent Was Liable For The Arson-Murder "Special Circumstance" Was Foreseeable And Defensible Under *Rogers* v. *Tennessee*

The history of the *Green* exception, outlined above, thus supported the California Supreme Court's ruling that the evidence overwhelmingly showed the arson-murder "special circumstance." According to his own statements to police and his trial testimony, respondent Clark had *concurrent* goals in setting fire to the victims' house. Clark's primary and immediate goal in setting the blaze, according to his own testimony, was not to cause the victims to die in the fire. He wanted to drive David out of the house so that he could shoot him to death. He *also* wanted to drive Ava and her infant daughter out of the house—for the stated purpose of shooting the husband in front of Ava and thus to intensify her "emotional

---

2. The unsettled status of the *Green* rule's application to "concurrent intent" cases is further exemplified by the California Court of Appeal's decision in *People* v. *Sheppard*, 192 Cal. Rptr. 427, 431-32 (1983), review denied but ordered depublished by California Supreme Court. Declining to "rush pell mell to expand *Green* and *Thompson* beyond the facts there stated," *Sheppard* found the kidnaping of the victim to a remote location in order to kill was not "merely incidental" to the murder, but rather was ""the first thing to'" the murder. The court noted the kidnaping had been carefully planned and calculated to enable the defendants to kill the victim without interference or detection. *Id.* Because *Sheppard* was depublished, petitioner does not cite it as legal authority, but rather as exemplary evidence of the unsettled state of the extent of the *Green* exception close to the time of Clark's crime.

pain." See Appendix C, pp. 55, 69 ; *People* v. *Clark*, 50 Cal. 3d at 595, 607.[3/] Like the defendant in *Murtishaw*, and unlike the defendants in *Green* and *Thompson*, Clark planned and intended to commit both murder *and* an underlying felony (arson) the purpose of which, according to respondent himself, was not solely to kill. In affirming Clark's conviction and sentence on direct appeal, the California Supreme Court found—in a ruling that was foreseeable and defensible in light of the *Green* rule's history—that such an intent "would not invoke the *Green* rule since defendant had independent, albeit concurrent, goals." *People v. Clark*, 50 Cal. 3d at 608-09.

D. The Ninth Circuit Failed To Give Proper Deference, Under *Rogers*, To The State Supreme Court's Function In Developing And Clarifying The Law, Especially In Light Of The Novelty Of The *Green* Rule Itself

As shown above, California's *Green* rule was a recent and novel judicial construct at the time of respondent's January 1982 crimes. Such issues as the meaning of "independent purpose," the role of "concurrent goals," and the applicability of parallel interpretations of the first degree felony murder statute (Cal. Penal Code § 189) and felony-murder special circumstance statute (Cal. Penal Code § 190.2(a)(17)) were matters of ongoing judicial "clarif[ication]", "reevalua-t[ion] and refin[ement]." *Rogers*, 532 U.S. at 461-62. The Ninth Circuit failed to accord the California Supreme Court latitude, under *Rogers*, to carry out those judicial functions. Indeed, the

---

3. Although this was Clark's professed goal up to and including the time he set the first of two fires in the house, commencing the crime of arson, there was evidence he later realized, seconds before setting the second fire, that the family was not going to be able to escape the burning house alive. Appendix A, pp. 11-12; *Clark* v. *Brown*, 450 F.3d at 906-07; Appendix C, pp. 69-70; *People* v. *Clark*, 50 Cal. 3d at 607-08. This likely explains the jury's verdicts of two counts of second degree attempted murder.

Ninth Circuit opinion barely mentions *Rogers*, relegating this Court's decision in that case to a mere "see also" citation and a nested citation to *Bouie* in the midst of the decision below. Appendix A, pp. 18, 25; *Clark v. Brown*, 450 F.3d at 911, 916.

The Ninth Circuit readily acknowledged that the language of the special circumstance statute itself—absent the judicial gloss of the "*Green* rule"—gave respondent ample warning that his conduct constituted capital-eligible murder. It strains credulity that respondent could have believed otherwise, or that he somehow had relied on the new and anomalous *Green* rule when he committed his horrific crimes.

But, instead of accommodating the evolving nature of California jurisprudence regarding the scope of the rare "technical felony" exception to the felony-murder special circumstance, the Ninth Circuit's opinion imposed its own, rigid and formulaic interpretation of California law, and anomalously faulted the state supreme court for straying from that formulation. Rather than assess whether the application of the special circumstance to Clark's crime was "[]defensible" under state law at the time of the crime, see *Rogers*, 532 U.S. at 457, 462; *Bouie*, 378 U.S. at 353, the Ninth Circuit focused on whether *its own* interpretation of California law was *more* defensible or foreseeable than that adopted by the state supreme court on Clark's appeal.[4]

If anything, the state court was entitled to more latitude in applying the *Green* exception in light of the novelty of the rule itself. Here, the allegedly "unforeseeable" state-court ruling was a California Supreme Court opinion interpreting a "special

---

4. One telling indication of this shift of focus is the fact that the opinion amplifies the importance of a lower state appellate court decision, *Ario* v. *Superior Court*, 124 Cal. App. 3d 285, 287 (1981), while curiously downplaying the significance of *Murtishaw*, a California Supreme Court case expressly distinguishing *Green*. Appendix A, pp. 21-23; *Clark* v. *Brown*, 442 F.3d at 723-24. Hence, the opinion appears to pick and choose among state court authorities in order to demonstrate that *its own* interpretation of California law was foreseeable and defensible.

circumstance" statute that had been enacted only four years before Clark's crime. Moreover, the judicially-created "*Green* exception" to that statute had only been announced less than two years before the crime. At the time of the arson-murder, the California Supreme Court had not yet squarely decided an issue particularly important to Clark's case: whether *Green* applied where a defendant harbored multiple, concurrent objectives for committing felony-murder. Logically, a state court grappling with a newly-created and unsettled area of state law requires even greater leeway to clarify, refine, and modify state law.

The Ninth Circuit's opinion has taken the *Bouie/Rogers* doctrine beyond its original rationale—to prevent "vindictive or arbitrary judicial lawmaking," *Rogers*, 532 U.S. at 460—and has transformed it into a legal trap to overturn state-court decisions on state-law questions. This Court should grant certiorari to ensure that the lower federal courts heed this Court's directives in *Rogers* to accommodate the state courts' function in developing evolving principles of law.

CONCLUSION

The petition for writ of certiorari should be granted.

Dated: August 25, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

MARY JO GRAVES
Chief Assistant Attorney General

PAMELA C. HAMANAKA
Senior Assistant Attorney General

DONALD E. DE NICOLA
Deputy State Solicitor General

KEITH H. BORJON
Supervising Deputy Attorney General

Scott Taryle

SCOTT A. TARYLE
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

60162109.wpd
LA2006502933